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FRA - 2001-11068-4



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BY COURIER

Docket Management System
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DEPT. OF TRANSPORTATION
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Dear Sir/Madam

Re: Docket Number FRA 2001-11068, Notice Number 1, 49 CFR Part 219, RIN 2130-AB39, Control of Alcohol and Drug Use: Proposed Application of Random Testing and Other Requirements to Employees of a Foreign Railroad Who are Based Outside the United States and Perform Train or Dispatching Service in the United States; Request for Comments on Even Broader Application of Rules and on Implementation Issues

Canadian National (CN) wishes to provide the following comments on the Notice of Proposed Rulemaking (NPRM) and Request for Comments as published in the December 11, 2001 Federal Register.

Canadian National is North America's fifth largest railroad with 18,300 route miles and 24,700 employees in Canada and the U.S. It operates the largest rail network in Canada and the only transcontinental network in North America. CN has operations in eight Canadian provinces and 14 U.S. states. In 1999 CN carried out an extremely successful integration with Illinois Central. It is currently implementing a similar integration with Wisconsin Central.

Safety is a core value at CN and the railroad has long been recognized as one of the safest railroads in North America. CN believes that an important part of an effective safety program is a drug and alcohol free workplace. As such, the Railroad ensures full compliance with all aspects of FRA requirements under 49 CFR Part 219. As part of the recent IC merger implementation, CN successfully consolidated the drug and alcohol programs for all of its US operations. In addition, Canadian-based train crews that operate into the United States are in full compliance with the current requirements of 49 CFR 219.

There are currently nine locations where CN Canadian-based train crews operate into the U.S. These are (with applicable mileage in each direction):

- Border to St. Albans, Vermont (18.7 miles)
- Border to Rouses Point, NY (1.2 miles)
- Border to Massena, NY (22.3 miles)
- Border to Buffalo, NY (7.6 miles to CSXT Frontier, 12.9 miles to SBRR Seneca, 10.5 miles to NS Tifft, or 19 miles to NS CPGJ, 27.3 miles to NS CP-Gravity)
- Border to Niagara Falls, NY (5.8 miles to CP22)
- Border to Port Huron, Michigan (1 mile to Port Huron or 77.7 miles to Flat Rock Yard)
- Border to Ranier, Minnesota (1 mile)
- Border to Noyes, Minnesota (1 mile)
- Sprague subdivision (43.8 miles across northern Minnesota from International Boundary to Baudette)

Although drug and alcohol testing is not legislated in Canada, CN has been conducting testing under company policies since 1986. In 1997, as part of a major overhaul of its safety programs, CN implemented a comprehensive drug and alcohol policy and program for its Canadian operations. This consolidated a number of existing programs

and practices to provide an exhaustive and clearly defined program. CN's new program was accompanied by an extensive training and communications plan and includes testing for:

- Pre-employment for specified risk-sensitive positions (drug only)
- Pre-assignment to a risk sensitive position
- Reasonable Cause
- Return to service/follow-up (post-treatment)

Revisions to the policy planned for 2002 will add mandatory post-accident testing using criteria identical to that of the FRA.

CN's Canadian drug and alcohol program also provides for employee self referral and co-worker report programs similar to those which would be required under the expanded scope of 49 CFR Part 219 proposed in the NPRM.

Of significance is that the CN policy for Canadian operations does not include random testing. This is entirely due to the Canadian legal climate and specifically the Canadian Human Rights Act which has in the past ruled that random drug testing is prohibited, even for safety-sensitive positions. Furthermore, random drug testing has been historically prohibited under Canadian railway labour arbitration jurisprudence. Although this may have been somewhat modified by a recent Ontario Court of Appeals decision, it has not been tested in the railway context. For this reason there remains considerable uncertainty regarding the legal status of random drug and even alcohol testing in Canada.

As such, this would be the most significant aspect of the proposed regulation as compared to CN's current practices.

As recently as 1999, CN hosted representatives from FRA and Transport Canada to discuss CN's drug and alcohol policy and associated programs for the railway's Canadian-based employees. At that time, CN explained in great detail the Canadian regulatory history with regards to drug and alcohol testing as well as all aspects of CN's current policy including testing provisions and Chief Medical Officer (CMO)/Medical Review Officer (MRO) involvement.

CN emphasized that the existing combination of FRA testing requirements and the lack of Canadian legislation has led to uncertainty and ambiguity that, in turn, have resulted in increased costs for the railroad industry and labor. It has also created a situation where instructions from the railroad companies to their employees are given a contradictory interpretation by unions thus leading to potential confusion.

CN concluded the 1999 session by stating that, while the policy has made a difference, the Railroad strongly believes that there is still the need for random testing for all safety critical employees in its Canadian operations. CN added, however, that under the current Canadian human rights legislation, expanding random testing to Canada can best be done if Transport Canada enact similar legislation to that in place under FRA in the United States. This remains our position

As such, CN generally supports the expansion of random testing as contained in the NPRM, but is extremely concerned that it will be difficult and potentially very costly to successfully implement within the boundaries of Canadian human rights legislation unless accompanied by comparable legislation from Transport Canada for all safety critical positions in Canada.

CN notes that FRA has been aware of the dilemma arising from the inconsistency with Canadian law for a number of years. In 1989, in a notice in the Federal Register, the FRA announced that it was delaying by one year (until January 2, 1992) the application of

random testing requirements for railroad personnel outside the United States so as "to allow negotiation with foreign governments to continue in an orderly and effective fashion." The notice added that such negotiations with the government of Canada have been progressing over the past year and that "DOT has made progress in the discussions with Canada and has found that there are a number of important issues on which the parties can agree. The Department continues to believe that, with additional time, it should be possible to reach an approach to the problem of drugs in the transportation industry that will be mutually acceptable." A similar further notice of delay in application to foreign-based employees was published in the Federal Register in 1992.

It is our understanding that similar discussions have more recently been held between FRA and Transport Canada as part of the Canada/US Land Transportation Standards Subcommittee under NAFTA.

Due to the nature of train crew collective agreements and railroad operations, for CN to implement random testing for those "covered" employees who operate into the US, the Railroad will need to create a random pool which includes many employees who are subject to, but may never actually operate into the U.S. Although human rights decisions pertaining to similar drug testing requirements for cross-border truck and bus drivers have helped clarify the situation somewhat, it remains that, without comparable Canadian legislation, CN would be in the extremely difficult position of having to balance the requirements necessary to fully comply with the FRA regulation against the very strict requirements which will be needed to satisfy the Canadian Human Rights Commission. It would also lead to the possibility of Canadian train crews refusing to be tested and having to be taken out of service, thus potentially tying up cross-border traffic and international trade. In many of the CN operations involving Canadian-based crews, there may not be sufficient infrastructure or resources to support alternatives using US-based crews.

In any event, CN will undoubtedly be forced to incur considerable expense in defending human rights challenges. This problem will be even more acute with respect to Canadian-based train dispatchers who do not physically set foot in the United States and therefore could claim protection under international law as it pertains to extent of jurisdiction.

For these reasons, CN supports the intent of expanding random testing but strongly urges FRA to continue to work with their Canadian counterparts in developing common drug and alcohol legislation. Such would greatly reduce potential costs and human rights/jurisdictional challenges while improving the safety of operations. It would also be consistent with the goals of NAFTA and the Canada/US Land Transportation Standards Subcommittee.

CN also wishes to make the following comments on specific items in the NPRM.

Extraterritorial dispatching – Section V of the Introduction in the NPRM states in part that “FRA does not propose to apply any or all of Part 219 to the few employees permitted to conduct extraterritorial dispatching under the Interim Final Rule based on that service”. The NPRM requests comments on this issue

As previously stated, CN supports the general concept of random testing for train dispatchers. As previously noted, however, it is our view that application of such a requirement for employees who do not actually set foot in the US will be extremely contentious from both the standpoint of human rights and territorial jurisdiction under international law. As such, we believe that this specific issue must be discussed in great depth with Transport Canada and we would strongly recommend that the two agencies resolve the matter through the application of common drug and alcohol testing requirement for train dispatchers.

It is also noted that, despite the comment in the Introduction suggesting that such train dispatchers would remain exempt from the full provisions of Part 219, there does not appear to be any specific wording in the actual regulation to accommodate this.

Handling of Foreign-based Signal Maintainers – Section V of the Introduction in the NPRM also addresses the issue of foreign-based signal maintainers who may be required to perform work in the U.S. The NPRM states “It appears that this activity is also *de minimis*. To FRA’s knowledge, no FRFB signal maintainer comes into the United States to maintain a railroad signal system on a regular basis, and only a few FRFB signal maintainers do so on an occasional basis.” The NPRM then concludes “After examining the *de minimis* impact of such extraterritorial or FRFB signal maintainers on rail operations in the United States, FRA has decided that such a proposal is not necessary at this time.” The NPRM solicits comments on this issue.

CN wishes to advise that the use of its Canadian-based signal maintainers to maintain signal systems in the US is very occasional and, in fact, even less than that started in the NPRM. CN only has signal maintainers located in southern Ontario who occasionally are required to work in the US in the Buffalo NY (Black Rock) area. As such, CN agrees that these employees should remain exempt from the requirements of Section 219. To this point, we also note that such positions would not be considered as “safety critical” under the Canadian Railway Safety Act and thus would not be subject to Canadian drug testing regulation, even if adopted. CN will continue to apply all testing aspects of its Canadian Drug and Alcohol policy to these employees.

Expansion of Post-Accident testing – In Section VII of the Introduction to the NPRM, FRA request comments on expanding the current requirements for post-accident testing. Specifically the NPRM states “Should FRA expand post-accident testing to include FRFB train employees who are involved in an otherwise qualifying event while in transit to or from the United States?”

Although CN supports post-accident testing, it is our view that such an expansion will be very difficult to defend from the standpoint of international law and territorial jurisdiction. In the case of fatalities, there could also be significant jurisdictional issues pertaining to FRA requirements for handling of tissue specimens and Canadian Provincial Coroner's powers.

As previously mentioned, CN is expanding its Canadian drug and alcohol testing policy to include post-accident testing using FRA criteria. It is our view that this will adequately address this issue.

Issues pertaining to laboratories and testing equipment – In Section VIII of the Introduction to the NPRM, FRA ask for comments on a number of issues pertaining to laboratories and test equipment in Canada. Specifically the NPRM asks if there would be problems with the shipping of specimens from Canada to FRA designated post-accident laboratories in the US when additional testing beyond that in part 40 is deemed necessary. In addition, the NPRM asks if foreign railroads would have difficulty obtaining and using evidential breath testing devices that are on the National Highway Traffic Safety Administration Conforming Products List as required for part 40 alcohol testing.

With respect to the issue of shipping of specimens, CN acknowledges that there could very well be delays in shipping due to customs issues, etc. It is suggested that the most effective means of addressing these issues would be to certify one of more Canadian laboratories to be able to perform the required analysis. This should not be difficult in light of the high level of technical sophistication at many Canadian labs

With respect to the ability to obtain and use the required breath testing devices, CN does not feel that this will be a problem. CN currently uses this equipment for its US operations and would be able to expand its use to Canada.

Regulatory Impact

CN has reviewed the Regulatory Evaluation and associated economic impact evaluation prepared by FRA for the proposed rule and provides the following comments:

In the section titled "Employees", FRA suggests that some 170 Canadian-based train crews employees would operate into the U.S. Although we do not have data for the other affected Canadian railways, CN has identified approx. 140 Canadian-based train crew employees at CN alone that are in pools that regularly operate into the US. Adding those spareboard employees that can occasionally work in the US, the overall number for CN would be in the order of 400. In either case, the number used by FRA to develop the cost of the proposed rule would seem to be considerably underestimated.

This section also states that Part 219 provides flexibility to allow railroads to exclude from the random testing pools employees who rarely perform covered service. Although it is unclear as to exactly what flexibility FRA is referring to, CN believes that, unless accompanied by similar Canadian legislation, the work involved in maintaining the pools and defending them in the context of Canadian Human Rights requirements will continue to be extremely difficult and costly.

In the same section FRA also suggests that "as a result of the requirements of the proposed rule, foreign railroads may decrease the number of train employees that operate in the United States to the minimum number required to perform the operations, under ideal conditions, and accept the risk of delay associated with not having some reserve engineers and other train crew members available." CN suggests that this would not be a viable option. CN's customers demand on-time service and the railroad has been able to succeed by providing this level of service. The Railroad's own much-documented scheduled railroad and associated asset utilization philosophies are

based on providing consistent performance. Clearly we cannot accept a risk of delay due to not having sufficient train crews cleared for operation in the U.S.

The last paragraph in the "Employees" section states that foreign-based dispatchers would not be affected by the extension of the rule due to the fact that they are not located in the U.S. This is inconsistent with the contents of the proposed rule, which indicates that, with the possible exception of existing "grandfathered" operations, foreign-based dispatchers would be subject to the expanded requirements. Similar conflicting statements are found in Section 9 of the document that states in part "FRA is not aware of any FRFB dispatchers currently performing dispatching functions in the United States or of any specific plans to have FRFB employees perform dispatching functions in the United States in the future". These inconsistencies must be clarified and the economic analysis adjusted accordingly.

CN also notes an apparent inconsistency in references to requirements for Pre-employment testing of train crews. In the section titled "Subpart F- Pre-employment Drug Tests", the document states that the employees of CN and other railroads with existing operations into the US "would not have to be tested as the requirement applies prior to the first time an employee performs covered service." Further on in the section of the document containing specific estimated costs, it is stated, "In the first year of the rule, the number of records kept would total approximately 140 percent of the number of covered train employees because pre-employment drug testing of all FRFB train employees would be required." Notwithstanding the fact that CN already conducts pre-employment testing for all train crew employees on both sides of the border, there would seem to be an inconsistency that needs to be clarified and properly reflected in the economic analysis.

An inaccuracy with regards to pre-employment testing is noted in Section 11 of the document, which states in part, "Only one (Canadian) carrier is currently performing

pre-employment drug testing.” Although FRA does not indicate which carrier they are referring to, the statement is incorrect as CN is aware of at least two Canadian railroads (CN and CP) that conduct pre-employment testing.

Also with respect to pre-employment testing, the document, in the section titled “Subpart F-Pre-employment Drug Tests” states “This analysis further assumes that railroads would only test train employees once they are confirmed for a specific movement into the United States. Employees otherwise qualified to enter the United States, but with no specific job assignment would probably not be tested unless the railroad was very confident that such an assignment was imminent. FRA requests information regarding the accuracy of these assumptions.” CN would continue to pre-employment test all prospective train crew employees under company policy regardless of the likelihood of their operating into the U.S. In addition, specific FRA reported pre-employment testing would most likely have to be conducted when an employee enters into a pool designated for potential U.S. operation. To test only when an assignment “is imminent” is not practical and would lead to train delay.

In the section of the document dealing with “Identification of Troubled Employees” FRA states that employees who either refer themselves or are reported by co-workers will take a leave of absence to receive treatment, and once rehabilitated, will return to service on the recommendation of a SAP. It should be noted that, for Canadian-based employees, the railroad’s Chief Medical Officer would also have to approve any return to service.

The same section of the document suggests that alternative policies for Identification of Troubled Employees are unlikely. CN is of the view that the role of the CMO and the differences between the Railroad’s peer reporting program and FRA requirements, although minor in nature, would result in the need for the filing of an alternate policy.

CN also notes that a number of the cost components associated with the new requirements would seem to be significantly understated. For instance, in the section of the document titled "Subpart G- Random Alcohol and Drug Testing" FRA estimates that the development and submission of a test program, as required under Part 219, would take only 1 hour. This would seem to be an extremely optimistic estimate. CN suggests that it would most likely take in the order of 8 - 24 hours to complete.

The document also suggests that, based on FRA historical data for U.S. operations, it can be expected that 1% of FRFB train employees will exercise their right to be excused from a random drug or alcohol test. It is CN's view that this number will likely be higher than that for U.S.-based employees as the Canadian Human Rights Act provides some additional protection for such situations.

The FRA analysis also does not account for a number of additional costs that would be incurred by railroads such as CN. Under Canadian law, drug or alcohol disorders are deemed to be disabilities. As such, a Canadian railroad must accommodate such employees to the extent possible. This will add additional cost to the railroads. This situation is different than for U.S. railroads where it is our understanding that the Americans with Disabilities Act does not have the same interpretation.

In addition, the combination of FRA regulations and Canadian Medical Rule requirements would add an additional cost for Canadian based crews which test positive for FRA required drug or alcohol tests. Under the Canadian requirements, the railroad's Chief Medical Officer would have the ultimate decision with regards to fitness for duty. Thus, in addition to the requirements associated with the SAP under FRA regulation, Canadian railroads would have an additional cost associated with CMO review of the fitness for duty of all employees who either test positive or are diagnosed as having a substance abuse disorder.

Also with respect to costs associated with employees on Leave of Absence, CN notes that under the Railroad's benefits program, CN may be required to pay sick leave benefits to such employees. CN would also be required to pay part of the rehabilitation costs. Both of these would be costs in addition to those estimated by FRA.

Of most significance with respect to the estimated costs to Canadian railroads as contained in the NPRM and economic evaluation is the complete omission of any mention of the costs that CN and other affected Canadian railroads will undoubtedly be forced to incur in defending humans rights challenges unless comparable Transport Canada regulation is enacted. Similarly there is no reference to potential costs associated with train delays, operations changes or cross-border trade disruptions due to coordinated refusals on the part of the labor unions to submit to random testing. As previously noted these are, by far, the major concerns that we have with the proposed rule.

In summing up the estimated costs of implementation, in Section 8 of the document, FRA states that the 20 year NPV cost is expected to total \$366,244 of which "\$84,945 would be spent by affected foreign railroads paying laboratories in the United States to maintain records and prepare summaries of FRFB train employee drug tests." It is unclear as to why FRA is of the opinion that U.S.-based laboratories would have to conduct this work. Certainly for a railroad such as CN, there would be benefit in having a Canadian-based laboratory perform the work. Elsewhere in the document, in fact, FRA indicates that there are qualified Canadian labs.

In Section 9 of the document, titled "Benefits", FRA provide data showing the number of accidents in which impairment due to drug or alcohol was listed as the primary or contributing cause. The data in this table seems to be inconsistent with that in a subsequent table displaying the results of post-accident test results. For instance, although there were 3 accidents in 1996 involving drugs or alcohol, there would only

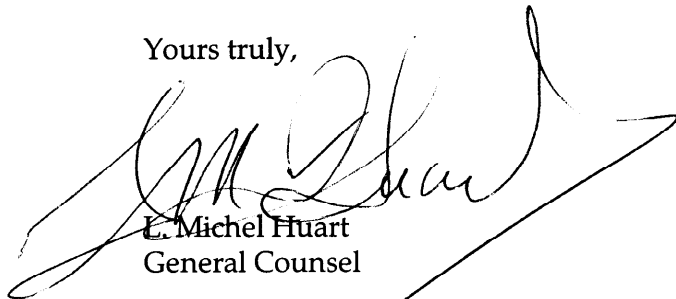
appear to have been 1 positive post-accident test. The reason for this inconsistency is unclear and should be reviewed.

Summary

In conclusion, CN generally supports the expansion of random drug and alcohol testing for safety-critical employees on both sides of the border but strongly urges FRA to continue to work with their Canadian counterparts to develop a common drug and alcohol regulation for railroad operations in the two countries. It is felt that such a measure will reduce the inevitable human rights/jurisdictional challenges and related economic impact on the railroad associated with applying U.S regulation to Canadian-based employees while improving the overall safety of operations and furthering the goals of NAFTA and the Canada/US Land Transportation Standards Subcommittee.

CN will be attending the public hearing and will be represented on that occasion by Karen Phillips, Vice-President, U.S. Government Affairs and Don Watts, Director, Regulatory Affairs.

Yours truly,



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